

Effective enforcement of responsible business conduct legislation

September 2021 (originally published in Dutch in 2020)

If legislation for responsible business conduct (RBC) is to be effective, compliance must be properly enforced. In this position paper,¹ the MVO Platform presents a proposal for setting up a public, independent regulator, as part of the smart mix of binding and voluntary policy instruments to promote RBC. The regulator's task will be to inform businesses on how to comply with the law, assess their compliance with the law and subsequently determine the most appropriate follow-up steps.

The objective of an RBC regulator is to promote the application of RBC standards by businesses as much as possible, and thereby prevent negative impacts by businesses on people, animal welfare and the environment. The regulator would do so by assessing companies' compliance with new RBC legislation, such as the Dutch Bill on Responsible and Sustainable Business Conduct² and the Child Labour Due Diligence Act. Proper enforcement will help ensure that responsible business conduct becomes standard practice, as opposed to the current voluntary status of RBC norms.³ A regulator will enable the Dutch government to assess the quality of companies' conduct⁴, after which it can take targeted policy measures if necessary, for example at sector level or for certain groups of companies.

Due diligence legislation and the work of the regulator should ensure that in addition to front runner companies, so-called 'laggards' and companies in the 'middle group' will also adhere to RBC norms, such as the OECD Guidelines for Multinational Enterprises. The complex nature of value chain issues and the dynamic nature of the RBC standards framework call for a form of regulation that offers companies the opportunity to improve and focuses on their ability to learn, in addition to more stringent measures, such as warnings and fines. It is important that the regulator promotes corporate transparency and increases companies' ambition levels, leading to actually addressing problems instead of simply avoiding them (the 'cut and run' effect). At the same time, it is necessary for the regulator to have sufficient power, capacity and budget to be able to take firm action when necessary.

The process: information – assessment – follow-up steps

In order to assess companies' and sectors' compliance with RBC legislation, the enforcement process includes informing, assessing and determination of follow-up steps:

1. *Information*: the regulator provides information on how companies should comply with their legal duty, using existing guidance documents and developing new ones where necessary. The regulator also makes it clear where companies can seek more in-depth information and support, such as the Dutch CSR Risk Check, the Netherlands Enterprise Agency (RVO), sector initiatives and RBC agreements, and the Dutch RBC support centre, which is expected to be established in the near future.
2. *Assessment*: the regulator assesses at company or sector level the degree to which companies meet the OECD Guidelines. The regulator conducts research on the basis of publicly available reports and discussions with companies and stakeholders, and if necessary carries out inspections. The regulator can also determine the way in which a company is linked to a negative impact on human rights or the environment ('cause', 'contribute' or 'directly linked'). The regulator carries out its work based on its own work programme as well as requests from the government and complaints filed by third parties.

¹ This position paper builds on discussions with scientific experts, civil society organisations and existing regulators in the Netherlands.

² See the [MVO Platform website](#) for more information on the Dutch Bill for Responsible and Sustainable Business Conduct.

³ A monitoring report of the Dutch Ministry of Foreign Affairs (2020) [showed](#) that only 35 per cent of the largest companies in the Netherlands have endorsed the OECD Guidelines. Even fewer companies actually report on conducting due diligence, according to the [Transparency Benchmark 2019](#) (in Dutch).

⁴ The Dutch government regularly states that it does not regulate, and cannot form an opinion on, the RBC conduct of companies. See, for example, statements by the government about the [oil and gas sector](#) ('The government cannot determine whether any improvements have taken place') and [abuses](#) in a project in Angola ('There is no enforcement of companies' compliance with these guidelines and principles; that is the companies' own responsibility').

3. *Follow-up steps*: Based on its findings in step 2, the regulator determines which follow-up steps are needed to improve compliance with RBC standards (see Box 1). The regulator can decide to make concrete and time-bound agreements with a company or sector, including consequences if companies fail to make sufficient efforts to improve their practices.⁵

Box 1. Instruments that the regulator can use in step 3

- a. *Informative*
 - i. Give further information to companies and refer to information sources (see step 1)
- b. *Cooperative*
 - i. Make recommendations for businesses
 - ii. Advise companies to seek links with sector initiatives
 - iii. Make agreements on an improvement process
- c. *Corrective*
 - i. Issue an official (possibly public) warning to businesses
 - ii. Impose a binding directive to implement recommendations or an improvement plan
- d. *Enforcement*
 - i. Impose an order, subject to penalty
 - ii. Impose an administrative fine
 - iii. Exclusion from government support (such as trade missions)
 - iv. Exclusion from government financing (such as trade financing, grants, aid packages)
 - v. Exclusion from government procurement
- e. *Punitive (in cooperation with the Public Prosecutor)*
 - i. Criminal prosecution of the company
 - ii. Criminal prosecution of the company's executives

The aim of this process is to improve the implementation of RBC standards by businesses. If in step 2 (the assessment) the regulator concludes that a company is not meeting RBC standards, but does have the ambition and potential to improve within a reasonable period of time, then informative and cooperative follow-up steps are probably the most appropriate. However, if the regulator finds that a company is unwilling to take action, shows no improvement after receiving information and recommendations, or deliberately violates RBC standards, stronger measures would be called for, such as corrective measures or sanctions. Because the regulator has the option of using more drastic measures, it is expected that more companies will be prompted to take action using the informative and cooperative instruments offered than is the case with the current voluntary policy mix. The regulator can also use various instruments to respond to the differing motives of companies for adjusting their conduct, such as reputational or legal risks.

The regulator makes use of *dynamic standard setting*, in the sense that it makes use of existing and new guidelines issued by organisations such as the OECD, as well as previous decisions and investigations undertaken by the regulator (case law) (Box 2).⁶ In addition, the regulator can identify 'good practices' for specific issues or sectors and use them to assess businesses.⁷ This will allow the regulator to further define the responsibilities of businesses and its assessment framework. It also means that the regulator is able to adapt to new developments in the field and the changing societal expectations of RBC standards, for example in the fields of climate, gender or animal welfare.

The regulator performs *situational enforcement*: the assessment of a company depends on the context in which it operates, its position in the value chain, its size, the severity and extent of any violations and the company's involvement in them ('cause', 'contribute' or 'directly linked'). The quality of the due

⁵ These instruments draw from the so-called 'enforcement pyramids', 'intervention ladders' and instrument mixes of, among others, the Human Environment and Transport Inspectorate (ILT), the Authority for Consumers and Markets (ACM), the Dutch Healthcare Authority (NZa), the Education Inspectorate (Onderwijsinspectie) and the Inspectorate for Social Affairs and Employment (Inspectie SZW).

⁶ Open norms are used in various fields of law, such as consumer law and corporate law.

⁷ See also C. van Dam & M. Scheltema (2020), [Opties voor afdwingbare IMVO-instrumenten](#) [Options for obligatory international RBC instruments (in Dutch)], p. 112-118.

Box 2. The strength of the OECD Guidelines

The strength of the OECD Guidelines, which describe the due diligence process, is that due to their open, general standards they can be applied to all companies: large and small, and in all kinds of sectors and value chains. In recent years, the OECD has developed the [Due Diligence Guidance for Responsible Business Conduct](#) (2018) and various [sector specific guides](#), with further explanations, answers to frequently asked questions, recommendations and concrete examples. Here are three examples of how elements of due diligence have been elaborated in existing guidance documents:

a. *How should a company prioritise risks?*

When prioritising the risks a company should address first, the Due Diligence Guidance clarifies that businesses should take into account the severity, scope and irremediable character of the negative impact (p. 42–45). The Guidance provides numerous examples of indicators that companies can use when prioritising risks.

b. *What steps can a company take to prevent or reduce negative impacts?*

The Due Diligence Guidance describes various steps a company can take to address negative impacts (p. 29–31), such as educating employees, consulting stakeholders, developing action plans, contacting suppliers, using (collective) leverage, improving contracts or setting up warning systems (p. 75–81). The sector-specific guides also offer concrete suggestions, for example for the [textile sector](#) (p. 103–186) or the [agricultural sector](#) (p. 49–69).

c. *What does 'meaningful stakeholder engagement' mean?*

The Due Diligence Guidance makes it clear who the stakeholders of a company are, how companies can give substance to a dialogue with stakeholders, when stakeholders should be consulted and how this can best be done (p. 48–51). The sector-specific guide, for example for the [mining sector](#) (p. 28–31), offers concrete recommendations for integrating stakeholder dialogue into business processes.

Companies can use these guides to further inform themselves on their legal due diligence obligations. The regulator can use the guides when assessing companies' compliance with the law.

diligence process is ultimately judged by the extent to which companies ensure that any negative impacts in their value chain cease and are remediated. It is therefore of great importance that the regulator specifically ensures that companies cease (their contribution to) the negative impacts and that compensation is made to the injured parties. When doing so, the regulator acts in accordance with the principles of reasonableness and fairness. A company must be able to justify why it carried out a certain step of due diligence in the way that it did. The regulator can decide to start an 'improvement process' with a company, in which concrete agreements about steps that are to be taken are made between the regulator and the company and are specifically tailored to the context or size of the company.

Working method of the regulator

The regulator determines which companies and sectors it will investigate in three ways:

- *The work programme.*⁸ In its work programme, the regulator determines the sectors, types of companies in terms of size, leverage in the value chain and RBC performance (front runners/middle group/laggards) and the RBC risks it will focus on in the coming period. In doing so, the regulator focuses on the companies and sectors with the most severe risks and where the greatest impact can be achieved (for example, where companies or sectors have relatively strong leverage in value chains). The regulator is free to assess other companies within its work programme as well, for instance as a result of new research or media reports.
- *Requests from the government.* The government may request the regulator to initiate an investigation of a company or sector.
- *Complaints from third parties.* Affected parties, trade unions and civil society organisations may submit a complaint about a possible breach of RBC standards. The regulator then assesses the complaint, processes it in accordance with a set procedure, including fixed response times, and launches an investigation if deemed appropriate. The procedure drawn up by the regulator

⁸ For example, see the [Annual plan 2020](#) (in Dutch) of the Dutch Ministry of Social Affairs and Employment.

should in any case ensure sufficient accessibility, transparency, accountability and predictability, as also recommended in the UNGPs' criteria for effective complaints mechanisms.⁹ The procedure should take into account inequalities in the information positions of the various parties involved and seek to eliminate these where possible. Based on this procedure, the regulator will decide whether or not to proceed with enforcement and, if so, in what form (e.g. issuing an instruction or imposing an order subject to a penalty or administrative fine).

The regulator may carry out various types of procedures to assess a company or sector. These include analysing publicly available information, such as annual reports and RBC reports, engagement with companies, requesting and reviewing company documentation that shows how it has conducted due diligence, and independent research. Although the due diligence process of companies almost always concerns international value chains, a national regulator can still check whether the due diligence process of a company operating in the Netherlands is in order. If necessary, the regulator can gather additional information, for instance by commissioning research abroad or by interviewing companies and stakeholders, such as affected parties, trade unions or civil society organisations. Existing examples of assessments of companies' compliance with the OECD Guidelines include the study on the Dutch oil and gas sector (2019)¹⁰ and various statements by the Dutch National Contact Point (NCP) for the OECD Guidelines.¹¹

Other functions of the regulator

In addition to enforcement that focuses directly on companies, the regulator can also fulfil other functions that promote compliance with RBC standards, such as benchmarking changes in corporate conduct by monitoring the number of companies that have publicly endorsed the OECD Guidelines and publishing the existing bi-annual Transparency Benchmark. The publication of such rankings and benchmarks can provide a positive incentive for companies to comply with RBC standards. The regulator can also make recommendations to the government, for example on the effectiveness and implementation of policy measures in the field of RBC. Furthermore, the regulator can play a role in assessing whether companies meet the RBC criteria for trade missions, government funding or tenders. In this way, the government can also offer positive incentives to companies to comply with RBC standards. If desired, the regulator can also advise the NCP, which remains responsible for mediation processes between complainants and companies.

Relationship between the regulator and multistakeholder or sector initiatives

Although compliance with the law will always remain the responsibility of individual companies, multistakeholder or sector initiatives aimed at promoting due diligence have a role to play as well. These initiatives, such as certification systems, multi-stakeholder partnerships and the Dutch RBC agreements, can serve as tools to support companies in carrying out due diligence. Among other things, these initiatives can help inform companies about the RBC standards framework and the legal due diligence requirements, support them in setting up their due diligence processes or facilitate joint risk management. This means that legislation is also able to ensure better quality and increased interest from companies in such initiatives, such as the RBC agreements.

In addition, certain multistakeholder or sector initiatives can contribute to effective enforcement, because information from these initiatives about the action plans and progress of companies can support the regulator in their assessment of a company. This would also help prevent creating unnecessary administrative burdens for businesses. Sector initiatives can also help the regulator identify good practices. When prioritising sectors and businesses in its work programme, the regulator can take into account the existence of a sector initiative and whether companies participate in it. If the regulator finds that the initiative meets certain criteria for quality, effectiveness and conformity with the OECD Guidelines, it may decide to focus on non-participating companies or other sectors first.

⁹ [UN Guiding Principles](#) (2011), p. 33.

¹⁰ [NCP](#) (2019), NCP Report by CE Delft/Arcadis regarding the Dutch Oil and Gas sector.

¹¹ For example, see the [Final Statement](#) in UNI Global Union vs. VEON case (11 February 2020).